



SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1945

No. 520

ALLEN POPE,

Petitioner,

vs.

THE UNITED STATES,

Respondent

BRIEF IN SUPPORT OF PETITION FOR CERTIORARI

1. ASSIGNMENTS OF ERROR

- (a) *The Court of Claims Has Misinterpreted the Special Act of February 27, 1942, and Has Not Complied With the Mandate of This Court.*

The Special Act of February 27, 1942 (R. 1), is specific in directing the Court of Claims "to determine and render judgment at contract rates" upon the claims of petitioner "for certain work performed for which he has not been paid, but of which the Government has received the use and benefit, namely, * * * for the work of excavating materials which caved in over the tunnel arch * * *."

Although the Court of Claims finds (Finding 8) that "all of the work", including excavation of materials which caved in from over the tunnel arch, "was useful and beneficial to the Government" and "none of it has been paid for", it has concluded that because petitioner was not entitled *under the contract involved in the original suit* to pay as for excavating materials caving in from above the tunnel arch, he is not entitled to such pay *under the Special Act*. How or why it arrives at this incongruous determination is difficult to understand but is apparently for one or all of three reasons. It says:

(R. 73). "First. * * * If the plaintiff (petitioner) urged upon Congress any claim based on these matters there is no intimation, either in the special act or the committee reports that Congress intended to create, for the plaintiff, rights to recover for them."

(R. 73). "Second. * * * Yet the obvious purpose of the special act was to create specially for the plaintiff, such rights as a correct decision *under the general law*, or a decision under law which accorded with good morals, if the general law did not, would have given him." (Italics added.)

(R. 75). "Third. * * * We think that in fact he had no intention of making such a claim to Congress, and that we have no right to seize upon the words 'contract rates' used in the statute, search the contract for a rate, and apply it to work which the contract itself expressly said, and the plaintiff repeatedly said, carried no separate rate of compensation at all. * * *." "There could be no possible equity in his claim for separate compensation for excavation, or for damages, because, *as to the estimated amount*, he knew he would have to remove it and the contract expressly said that he would not be separately paid for doing so. * * *." (Italics added.)

(R. 83). "When we so interpret the special act as to make the plaintiff's former claims and testimony, his former failure in this court, his statement to Congress, the report of the Committee, which that statement induced, and the spe-

cial act, as one consistent whole, we have no doubt that we are giving to the plaintiff the full measure of relief which Congress intended him to have."

In other words, the Court has concluded that because plaintiff had in the old suit not specifically claimed as for excavating materials caving in from outside the "B" line over the tunnel arch; because in his statement to Congress based on claims upon which he then asked relief, he did not, allegedly, describe the work of excavating caved-in materials (but as to this see the facts as thoroughly reviewed in dissenting opinion by Littleton, J., concurred in by Whitaker, J. (R. 84-110); see for legislative history, Appendix hereto; and because the Committee of Congress in making its report preceding the enactment of the Special Act did not in terms allude to the extra work incident to the excavation of caved-in materials, then Congress could not have meant what it said when it directed the Court of Claims to hear and determine the claim for "excavating materials which caved in over the tunnel arch", when if such work was found to have been performed, to have been beneficial to the Government and never paid for. The Court has found that the work was performed; that it was beneficial to the Government; and that it has not been paid for, but it disallowed the claim "for the work of excavating materials which caved in over the tunnel arch" notwithstanding.

Petitioner says that this is a serious misinterpretation of the meaning of the Act and of the reasons therefor. It is quite true petitioner did not in his original suit assert as a separate item of claim a claim for excavating and removing materials which caved in from above the tunnel arch. He did assert a larger claim for the extra expense incident to excavating the tunnel through caving materials where stable materials were shown on the drawings as to be

expected (see facts as reviewed by Judges Littleton and Whitaker, R. 84-110). The Court in the old case disallowed that claim. In going to Congress petitioner asked for the contract price for excavating the caved-in materials. Congress saw the merits of the claim and provided that the Court should adjudicate the same. The same proof that established the quantity of dry pack and grout establishes with equal certainty the quantity of materials which caved in from the space filled by dry pack and grout.

The Court below makes much of the fact that the old contract fixed no contract price *per se* as for excavating from outside the "B" line. This is true. It is true also of the materials which caved in from beyond the "B" line of the side walls which is here allowed at the "contract rate." The *contract* no more fixes a price for excavating side wall cave-ins from beyond the "B" line than it does for excavating cave-ins from over the tunnel arch, but the *Special Act* fixes a price—contract rate for excavation—for both. If the Act warrants the allowance of contract rates for excavation of cave-ins from the side walls—and the Court finds that it does—it would surely seem that it equally authorizes payment at contract rates for excavation of materials caving in from overhead. Both excavations were of materials coming from outside the "B" line.

In any event, this is not now a suit under the contract. It is a suit under the Special Act, on a cause of action created by the act. The Court below by applying the contract and what happened in suit thereon has misinterpreted the meaning and effect of that act, and this Court alone can correct the misinterpretation.

This Court when the case was previously before it said (323 U. S. 1, 9):

"The Special Act did not purport to set aside the judgment or to require a new trial of the issues as to the validity of the claims which the Court had re-

solved against petitioner. While inartistically drawn the Act's purpose and effect seem rather to have been to create a new obligation of the Government to pay petitioner's claims where no obligation existed before."

And again (p. 10):

"Congress, by the creation of a legal, in recognition of a moral, obligation to pay petitioner's claims plainly did not encroach upon the judicial function which the Court of Claims had previously exercised in adjudicating that the obligation was not legal."

The mandate of the Supreme Court directs the Court of Claims to take "further proceedings in conformity with the opinion of this Court."

It would seem that the present judgment of the Court of Claims is not in conformity with the principles enunciated in the decision of this Court or in compliance with the mandate. As before stated, the Court of Claims persists in determining the item of claim now in question on the basis of the contract in suit in the old case and what happened in the proceedings thereunder.

(b) *Because Petitioner Was Not in the Old Case or Now Entitled to Pay for Excavating Materials as a Contract Right Is No Reason Why, Under the Act, Claim for Pay for Such Work Is Precluded.*

The action of the Court of Claims in disallowing claim "for the work of excavating materials which caved in over the tunnel arch" is largely and basically predicated on the fact that Pope, the petitioner, did not in the old case under the contract make such claim.

This is true, but immaterial. As a matter of contract right he had no such claim. The present claim is not made *under the contract* but *under the Special Act*. The question, therefore, is not whether the claim is warranted

by the contract or by general law, but whether same is validated *by the Special Act*. The Court by a confusion of issues has lost sight of the true one.

The Court dwells much on certain phases of the old case:

(1) That Pope did not there claim as for excavating caved-in materials;

(2) That he there conceded that the contract gave him no pay, fixed no price, for excavation beyond the "B" line;

(3) That his compensation for excavating from beyond the "B" line was in the price he would get for dry-packing and grouting spaces created by such over-breakage, etc., and

(4) That the contract fixes no price for excavating materials from beyond the "B" line.

There is a ready answer to each of these propositions:

(1) He did not in the old case claim as for excavating materials caving in from over the tunnel arch. He did there claim and prove that the cave-ins were the result of encountering soft, seamy rock where "hard rock" was shown on the drawings, and that the refusal of the contracting officer to permit timbering support that would have prevented substantially all caving in of materials as the tunnel excavation proceeded was primarily responsible for the cave-ins.

(2) The contract was specific that excavation from beyond the "B" line would not be paid for but no such excavation was done. Materials did cave in from outside the "B" line and had to be removed, not from *above* but from *within* the "B" line.

(3) He did say that for the normal, expected small (500 cubic yards) amount of over-breakage from beyond the

"B" line, under the contract representations, he expected to find his pay in what he would get for dry-packing and grouting outside the "B" line. But the cave-ins were many times the estimated 500 cubic yards of overbreakage—5,561 cubic yards of space created by cave-ins were actually filled with dry-pack, and a much larger space, likewise created, was filled with *earth from the surface*, for which no claim is made because the yardage thereof cannot now be determined. Certainly, the price now belatedly allowed for dry pack and grout would not include any pay for the great mass of materials which actually caved in, all of which were required necessarily to be excavated and removed.

(4) The contract fixed no price—it barred payment—for excavation from beyond the "B" line. All the materials caving in—those from the *side walls* as well as those from *over the tunnel arch*—were from *outside the "B" line*. For their excavation the *contract* fixed no price. But the *Act* does fix a price, namely the "contract rate" for excavation. For excavation of materials caving in from the side walls, the Court complies with the Act and allows payment at the contract rate for excavation, but for excavation of materials caving in from above the tunnel arch, it, not very consistently, says the Act fixes no rate. Surely this can only be the result of misinterpreting and failing to apply the plain intent of the Act.

(c) *Is It True That Neither the Committee Reports Nor the Special Act "Intimates" an Intent by Congress to Create for Petitioner a Right to Recover for the Work of Excavating Materials Caving in from Over the Tunnel Arch?*

The Court of Claims says that it is. Petitioner says that nothing could be farther from the truth. The legislative record (see Appendix hereto) shows that petitioner

claimed this before Congress; the bills introduced and the Committee reports show it and the Act itself is plain and unambiguous in sanctioning its allowance (see dissenting opinion, R. 84-110). The Court below would appear to have ignored all this.

- (d) *Judgment Should Have been Rendered in Petitioner's Favor for All Claims Listed in the Act, Including That "for Work of Excavating Materials That Caved in (from) Over the Tunnel Arch."*

If petitioner's understanding of the Act is correct it is obvious that the Court below has wandered far afield in its interpretation thereof and has misconceived and misapplied what Congress intended.

2. REASONS FOR GRANTING WRIT

The reasons for granting the writ asked would seem to be sufficiently stated in what has been said under Assignments of Error.

It is respectfully submitted that the petition should be allowed and the judgment of the lower Court reviewed.

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